No. 957.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CLARA E. SACKETT,

Plaintiff in Error.

vs.

MARY McCAFFREY and
JOSEPH McCAFFREY,

Defendants in Error.

Reply Brief and Argument of Plaintiff in Error, Clara E. Sackett.

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Butte Miner Print, Butte, Montana

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ARGUMENT IN REPLY.

It being provided in the stipulation on file that a reply brief may be filed on or before October 15th, counsel for plaintiff in error respectfully ask the Court to receive and consider the following reply to the argument of counsel for defendants in error.

THE STAMP QUESTION.

Counsel for defendants in error erroneously infers that plaintiff "does not insist upon the first ground of her objection," to-wit, "that said instrument (the homestead declaration as distinguished from the certificate of acknowledgement thereto) offered in evidence was not stamped as required by the laws of the United States, in force at the date of its execution." Counsel for plaintiff have not withdrawn this objection, and ask its consideration.

Counsel for defendants maintain (1) that the copy in the record (Tr. pp. 27-28) of the homestead declaration offered in evidence by the defendants, and admitted, does not show that the declaration was not stamped, because said copy purports to be only the copy of an instrument or paper, and a stamp is not a part of any paper or instrument to which it is affixed, and would not necessarily appear upon a copy thereof; and (2) that the objection to the admission of the declaration on the ground (Tr. p. 28, l. 29), "that the notarial certificate to said instrument offered in evidence was not stamped as required by the laws of the United States in force at the date of its execution," was not sufficiently specific because (Defts. Br. p. 4, l. 16 et seq.), "it cannot be told therefrom whether the admission of the declaration was objected to because the stamp was not of large enough denomination, or because the stamp was uncanceled, or because there was no stamp of any denomination upon * * * the certificate of acknowledgment, or because the stamps had been put on after the filing of said declaration for record without the formalities required by law in obtaining the permission of the internal revenue collector for the district and having the same canceled by him."

To the first point, our reply, which is perhaps as technical, but fully as logical as the objection, is, that what was offered in evidence was the homestead declaration (Tr. p. 27, l. 1, 2) and that as the stamp, according to defendants' argument, was not part of the declaration, it was not included in the offer of the declaration, so that the offer, being of a homestead declaration without a

stamp, should have been refused under the objections, and the admission of the instrument was error.

Under the second point urged by defendants it must be admitted that the objection quoted therein is ambiguous, by reason of the inadvertant omission of a comma after the word "stamped." The objection was made on the ground that there was no stamp on the certificate of acknowledgment, and was decided on the theory that the acknowledgment required no stamp.

Under rule 14, sub'd 4 of the Rules of this Court, providing that when the judge of the lower Court deems it necessary or proper that an original paper of any kind should be inspected in this Court, he may cause the same to be transmitted to this Court where it will be received. and considered in connection with the transcript of proceedings, we asked the judge of the trial court in this case to cause said original homestead declaration to be transmitted to this Court, which has been done. An examination of said instrument shows it to be entirely unstamped, and the points which defendants attempt to make are therefore disposed of. Where a copy of an instrument in the record cannot in the nature of things show its actual condition or what it contains, we deem it a proper case for asking the transmission of the original for the inspection of the appellate court. The reason for the practice of transmitting copies instead of originals to the appellate court is, on account of the greater convenience and because, ordinarily, a copy will advise the appellate court of the condition of the original as fully as may be neces-

sary. And when this information cannot be afforded by a copy, the original should be sent.

Defendants next urge (Dfts.. Br. pp. 7-12), that the provision in Schedule A. of the War Revenue Act taxing "Certificates of any description required by law not otherwise provided for in this Act" does not include the certificate of acknowledgment of a homestead declaration, because,

(1) Such certificate is properly described as "proof of acknowledgment," and congress would have used that term if it had intended to tax such certificate, and that, by reason of the common use of the term "proof of acknowledgment" as applied to such certificate, there is at least a doubt raised as to whether congress intended to tax a certificate of acknowledgment, which doubt must be resolved in favor of the person taxed.

2. That the tax, if intended to be imposed on a certificate of acknowledgment, is a tax on the Notary taking the acknowledgment, or upon the official duty performed by him as an officer of the State of Montana, and that congress has no power to impose a tax upon the function of a state government, or upon the acts of an officer done in the performance of those functions.

Under the first point, it is sufficient to say that defendants' argument is based on a mis-statement of fact. Nowhere in the Montana Codes is the certificate of acknowledgment referred to as "proof of acknowledgment." Thus the sections of the Code referred to by counsel for defendants (which defendants' counsel does not quote, as re-

quired by Rule 24, sub'd c., and which appear in the Civil Code, and not in the Code of Civil Procedure as stated by him), read as follows:

"SEC. 1600. The proof of acknowledgment of an instrument may be made at any place within this state before a Justice or Clerk of the Supreme Court or a Judge of the District Court.

"SEC. 1601. The proof *or* acknowledgment of an instrument may be made before either: (designating certain officers).

SEC. 1602. The proof of acknowledgment * * * may be made * * * before either: * * *.

SEC. 1603. The proof *or* acknowledgment * * * may be made * * * before either: * * *."

It will be observed that in Section 1600 and Section 1602, the phrase is "proof *of* acknowledgment," whereas in Section 1601 and Section 1603, the phrase employed is "proof *or* acknowledgment."

In the corresponding California sections, from which these were copied (Cal. C. C. Section 1180-1183), the uniform phrase is "proof or acknowledgment." The word "of," where it occurs in the Montana sections quoted, is, therefore, clearly a misprint for "or," so that the phrase should read in all of the sections "proof or acknowledgment."

The proof of an instrument is its authentication otherwise than by a certificate of acknowledgment, as, for instance, by the testimony of a subscribing witness taken

before an authorized officer, reduced to writing and authenticated in such a way as to entitle the instrument to record; while the acknowledgment of an instrument is the statement of the person executing it that he "executed the same," made to an officer who certifies it in the form of a certificate of acknowledgment, whereupon the instrument becomes entitled to record.

The sections quoted provide for taking this proof or acknowledgment *before* an officer; the certificate is not taken *before* the officer but is made by him; and then the officer, having taken the acknowledgment, must attach to the instrument a certificate of acknowledgment under Sections 1573, 1608 and 1609 of the same Code (See Plfs. Orig. Br. p. 15).

Under the second point defendants' counsel quotes Section 7 of the War Revenue Act providing that no one shall "make, sign, or issue or cause to be made, signed or issued, any instrument * * * without the same being duly stamped * * * or without having thereupon an adhesive stamp to denote said tax * * *." We submit that the obvious meaning of this provision is, that where one person causes another person to make, sign, or issue an instrument without the same being duly stamped, the former is liable for the payment of the tax, and not the latter; and that it is the duty of the former, and not the latter, to furnish and affix the stamp. Otherwise, when a person takes an instrument to a notary before whom he acknowledges it, and no stamp is placed upon the certificate of acknowledgment, both would be liable for the omission, the notary for signing the certificate without affixing

a stamp, and the principal for causing the acknowledgment to be taken and the certificate added, without himself affixing the stamp. The stamp is a tax. If a person makes his own promissory note, he is, of course, liable for the tax. If his agent, acting within the scope of his authority, makes the note in the principal's name, without affixing a stamp, it is evidently the principal and not the agent who is liable to pay the tax, although he did not sign the instrument, but "caused" it to be signed. The agent signs the instrument, but is not thereby made personally liable to pay to the government the amount of the tax. Whether the agent would be liable to the penalty imposed for non-stamping, in said Section 7, it is not necessary to decide; this suit is not brought to collect a penalty. The utmost that could be claimed under Section 7, is, that it forbids the notary making the certificate without the same being stamped (by somebody). The section does not say that one must not sign a paper, required to be stamped, "without stamping the same," but that he must not sign it "without the same being duly stamped * * * or without having thereon an adhesive stamp to denote said tax." In view of this prohibition, the notary need not make the certificate at all, if he does not wish, unless a stamp is furnished by the party in interest. There is no requirement that the notary furnish the stamp, and therefore there is no tax upon the notary or his official functions. Sections 7, 14 and 15 of the War Revenue Act, quoted on page 23 of Plaintiff's original brief, forbid the admission in evidence or to record of an unstamped instrument which is required to be stamped; and the party in interest, offering it in evi-

dence or for record, must at his peril see that it is properly stamped.

As shown on page 16 of plaintiff's original brief, the Treasury Department has ruled that a certificate of acknowledgment requires a stamp. The Department has also ruled that a certificate must be stamped, not by the officer making it, but by the party in interest.

"Certificates required by law issued by any department or officer of the government at the request of private persons, solely for private use, should be stamped. The stamp should be furnished by the person applying for the instrument and for whose use or benefit the same is issued * * *." Dec. Comm. Int. Rev. Vol. 1, p. 312.

Also in Vol. 2 of said decisions, pp. 71-74 (Ruling No. 20,551), the question having arisen as to the taxability of certificates of authority issued by the State of Missouri, through the state insurance commissioner, to agents of insurance companies, and also the question whether, if such certificates were taxable, the stamp thereon should be furnished by the State Commissioner who would execute the certificate, or by the insurance agent who secured it, the Treasury Department held, under the advice of the Attorney-General:

a. That such certificate was taxable because not necessary in the operation of the general machinery of the state government, and because, the issuance of the certificate though an official act, was performed at the instance of a private individual, in serving interests other than those required to carry on the governmental machinery.

b. On the question as to who should furnish the stamp to be placed on the certificate, the ruling of the department reads:

"Nor, because it is the duty of the Insurance Commissioner to affix a 10-cent stamp to such certificate of authority, does it follow that the state must pay such tax. The law imposes the duty of affixing the stamp on the person executing and issuing an instrument, but it does not say that such person shall pay for the stamp. As you will observe in the Attorney-General's opinion, the tax must be paid by the party for whose use or benefit the same is issued, which in this case, is the insurance agent. The citizens of a state are citizens of the United States, and are not exempt from taxation because in the course of their business it becomes necessary for them to secure a certificate of authority from the state. The certificate is issued at their instance and for their benefit, and they must pay the tax."

The question, therefore, whether the notary, in taking an acknowledgment, acts judicially or ministerially, is immaterial. Yet, in the Cyclopedia of Law (2d ed.) vol. 1, pp. 485-487, under the head of "Acknowledgments," it is said, "The weight of authority seems to be in favor of the view that the act is ministerial, and not judicial."

It is difficult to see any judicial quality in the act of a Notary in receiving a statement from the person executing an instrument that "he executed the same," and then certifying such statement. Under the former California and Montana law, providing that the Notary, in taking the acknowledgment of a married woman, must examine her

separate and apart from her husband as to whether she executes the instrument freely and voluntarily, a judicial quality in the Notary's act may be discerned, and it was such an acknowledgment under consideration in the California case cited by defendants (Wedel vs. Herman, 59 Cal. 514). In the Cyclopedia of Law (2d ed.) vol. 1, pp. 487-488, under the head of "Acknowledgments," it is stated that "in Mississippi a distinction has been made between taking the acknowledgment and making the certificate, the former being looked upon as a judicial and the latter as a ministerial act." Under that view, the making and signing of the certificate of acknowledgment which is to be taxed, is a ministerial act. A similar distinction is apparently made in the above cited California case, where it is held that the making of the acknowledgment is a necessary part of the execution of a married woman's deed, but that the "certificate of acknowledgment is not an essential part of her conveyance. That, under the codes, is regarded simply as record proof of the fact of acknowledgment * * *. In *taking the acknowledgment* the officer acts judicially."

It is provided in the California Political Code Section 801 (Montana Section 919), that a Notary and his sureties are liable in damages for his official negligence. And in Joost vs. Craig, 131 California 504 (63 Pac. 840), in construing this provision, it is held that a Notary does not act judicially in taking an acknowledgment.

And in the case of First National Bank vs. Roberts, 9 Mont. 338 the Court seems to hold that a Notary, in taking an acknowledgment, does not act judicially.

The duty of a Notary in taking an acknowledgment has no connection with the administration of justice; he is not acting under commission from any court; and the paper acknowledged, with the acknowledgment thereto, is and remains private property.

Counsel for defendants maintains, on pages 12-14 of his brief, that the words "instrument, paper or document," in Section 14 of the War Revenue Law refers only to the body of the instrument and not to the certificate of acknowledgment thereto, to the principal thing and not to the mere incident, to the homestead declaration and not its acknowledgment; that such words refer to "the thing which is to be used in evidence," meaning the declaration minus the certificate; and he says, "The proof of acknowledgment or certificate of acknowledgment is not the instrument, nor the paper, nor the document which was sought to be introduced in evidence," and that, "The proof of acknowledgment cannot by any proper construction of this statute be denominated an instrument, paper or a document required by law to be stamped."

This argument appears to be the proverbial "grasping at a straw," and in reply we would say:

1. The certificate of acknowledgment was required to be stamped, as heretofore abundantly shown.

2. Such certificate was offered and admitted in evidence as a part of the declaration (Tr. pp. 26-28).

3. Under Section 1700 Mont. C. C., quoted on page 15 of the plaintiff's original brief, the certificate was necessary to the validity of the declaration; and under the

numerous authorities quoted on pages 27-31 of the same brief the certificate was a necessary pre-requisite to recording without which the recording was a "nullity," and recording was necessary to the validity of the homestead declaration under Sections 1702 and 1703 of the Montana Civil Code, quoted on page 31 of plaintiff's original brief. It follows that defendants were compelled to introduce the certificate in evidence, as well as the declaration to which it was appended, both to show that a complete declaration was made and that the same was recorded. If defendants did not put the certificate in evidence, they failed to prove a homestead. And as the certificate is required to be stamped, it could not go in evidence without being stamped. A certificate of acknowledgment is always appended to another instrument, and, in a sense is an incident thereof. If, as counsel contends, the penalty of exclusion from evidence does not apply to the certificate, then none of the penalties for non-stamping apply to it, and we are driven to the conclusion that Congress imposed a tax on certificates without intending that its collection should be enforced. Counsel for defendants has argued that Section 7 of the revenue law (page 12, Dfts. brief) imposes a tax on the Notary making a certificate of acknowledgment; but the same words "instrument, document or paper" are used in that section, so that his argument there is that said words do refer to a certificate of acknowledgment.

In the case of Reid vs. Mercantile Co. (Cal.), 58 Pac. 1064, the Court decided that the certificate of acknowledgment of a homestead declaration was not part of the decla-

ration; it must, then, be a separate document. On the other hand, if it is a part of the declaration, the requirement that the certificate be stamped is a requirement that the declaration be stamped in a particular part thereof. The Revenue law imposes taxes on many classes of certificates, and probably most of these are designed to be appended to some other instrument which requires such a certificate. Congress evidently intended that the tax on these certificates should be enforced, otherwise it would not have taxed them, and the means of enforcement, such as exclusion from evidence, must be held to apply to them.

On pages 15-18 of defendants' brief it is urged:

1. That the requirement in the revenue act that unstamped instruments be excluded from evidence, is not binding on the state courts, because Congress has no power to impose a rule of evidence on state Courts.

2. That the requirement that such instruments be excluded from record is not binding on state recording officers, "for the same reason."

The first point is immaterial in this case, as this is a Federal Court. As we have stated (Plf. Orig. Br. p. 26, l. 25), these same decisions concede that the section (Section 14, Rev. Act) is binding upon Federal Courts.

As to the second point, it seems to us that the requirement that county recorders exclude unstamped instruments from record is both reasonable and necessary as a regulation for the collection of the revenue, and that the second point has much less force than the first point urged by counsel.

The only Federal authorities on this point are cited

on page 33 of plaintiff's first brief; and outside of what appears in said cases neither of these points have ever been decided, so far as we can find, by any Federal Court. Our position is that the state cases cited in defendants' brief on these points, and especially on the second point, if followed, will nullify revenue statutes of the Federal government which are reasonable and constitutional.

On pages 18-20 of defendants' brief it is urged

(1) That Section 14 of the War Revenue Act could have no application to a repeal portion of Schedule A or to Schedule A after its repeal.

(2) That it is the uniform rule of law that when the law imposing a penalty is repealed, the penalty can no longer be exacted.

(3) That it is against public policy to hold that when the law imposing a tax has been itself repealed, that the instrument which was the subject of the tax should still be excluded from evidence on account of the non-payment of the tax.

Under the first point, we have abundontly shown (pp. 17-22, plfs. orig. Br.) that the repeal of the tax is not retrospective, the tax still remains due despite the repeal of the law imposing it; that is to say, said law is not repealed but remains in force as to taxes already due.

On the second point, on page 19 of defendants' brief, early Federal authorities are cited setting forth the common law rule that when a law is repealed the penalty for its infraction falls with it. But Section 13 of the Revised Statutes of the United States, was designed to repeal.

and did repeal this common law rule, as expressly stated in the Federal authorities cited on pages 25 and 26 of plaintiff's original brief.

In regard to the third point, in the case of United States vs. Barr, quoted from on page 26 of plaintiff's original brief, the Court, instead of viewing the perpetuation of the penalty by Section 13 R. S. as against public policy, expressed the opinion that Section 13 was "a salutary provision." It is proper that the government should collect its dues, and that the repeal of a tax should not be allowed to operate in favor of persons who have evaded its payment or failed to contribute what was due from them for the support of the government; if such persons are to be excused, then those who have promptly paid their taxes should have their money refunded.

Section 13, R. S. is a general saving clause. And, as stated in State vs. Sloss (Plfs. orig. Br. p. 24), "An express saving clause was not required to save the right to collect." The tax remained due after the repeal of the law, and the machinery for enforcing its collection was retained unrepealed.

THE FEDERAL HOMESTEAD QUESTION.

1. NEITHER A MAN NOR A MAN AND HIS WIFE CAN HAVE TWO HOMESTEADS, AND IF THEY, OR EITHER OF THEM, ATTEMPT TO ACQUIRE A SECOND WHILE THE FIRST IS IN FORCE, THE SECOND IS VOID.

The Montana law does not expressly prohibit a man

from having two state homesteads in Montana at the same time; yet no one would maintain, nor does counsel for defendants maintain, that a person could have two such homesteads; it is an implied condition of the law that it cannot be done, and that a man claiming a homestead must not already have one in the same state. It was so held in Waggle vs. Worthy, 74 Cal. 266, where the second homestead was held void. The construction placed upon the homestead law by the case cited was adopted in Montana along with said law, and is binding on the Courts of this state. (See authorities cited on page ~~38~~ 76 of plaintiff's original brief). Said case stated the rule without the qualification that the first homestead be in the same state. All of the authorities holding that a man cannot have two homesteads (and we find no authority holding that he can), state the rule without qualification, and none of them even intimate that a man might hold two homesteads provided they are located in different states. As it is an implied condition of the law that a man must not have two homesteads in the same state, so there is no reason why this implied condition should not prohibit two homesteads though the first one be in another state, or be a federal homestead. And, under the authorities already cited (p. 38, plfs. orig. Br.), the wife has no more power to acquire the second homestead than has the husband, and by Section 1700, Montana C. C. she is forbidden to select a homestead if her husband has already selected one.

Counsel for defendants in error maintains that, if a man cannot acquire a state homestead when he has a subsisting Federal homestead, then the converse of the propo-

sition must be equally true, so that if he has acquired a state homestead which he has not formally abandoned, he cannot acquire a Federal homestead. But this conclusion does not follow, since the holding of a homestead claim under the Federal law is primarily a process of acquiring title to, or purchasing, the homestead tract; and while the Federal law imparts to that tract all the essential qualities of a homestead under the state law, and gives to the claimant immunity from levy of execution, these features of the law are rather incidental to the main process of acquiring title. The officers of the government might, therefore, be warranted in refusing to interrupt this process, or to annul the contract between the government and the claimant, merely because the claimant was still holding a homestead exemption under the state law. If it were necessary to cure such an inconsistency, it would doubtless be done by the government requiring the claimant to file an abandonment of his former homestead, rather than by its declaring a forfeiture of the Federal homestead.

2. IT IS NOT NECESSARY, IN ORDER TO BAR A SECOND HOMESTEAD, THAT THE PRIOR HOMESTEAD BE "EQUIVALENT" THERETO, OR BE CREATED UNDER THE SAME FORMALITIES.

Originally a declaration was not required, either in Montana or in California; the later codes required a declaration for the creation of homesteads thereafter established, and gave such homesteads incidents different from those of the homesteads already existing. Yet, no one would claim that, by reason of these differences a man

having already a homestead under the old law, could acquire an additional homestead under the new law. This was attempted to be done in Georgia, and the second homestead was held void on the ground that a man cannot hold two homesteads. (First National Bank vs. Massengill, 5 S. E. 100, cited p. 36, plfs. orig. Br.).

If a man cannot hold two homesteads in the same state, created under different laws and with different incidents, then, for the same reason, he cannot be allowed to hold two homesteads in different states merely because the two homesteads are not "equivalent" or of precisely the same character. And if a claimant cannot acquire a state homestead in Montana when he has a homestead in another state, he cannot, for the same reason, acquire a state homestead in Montana, if he has a subsisting unpatented Federal homestead, because a Federal homestead is as nearly "equivalent" to a state homestead in Montana as are state homesteads, generally speaking, in other states. Probably most states do not require a declaration; many states give the husband power to abandon, encumber or alienate the homestead without the consent of the wife, holding him best qualified to decide such questions, and holding the essential object of the homestead exemption to be, not to protect the home against the acts of the head of the family, but against creditors; and there is great variety in the extent of the exemption, the length of time it covers, and the exceptions thereto.

It is sufficient to bar a subsequent homestead that the claimant already have a homestead exemption of a substantial character. The Federal homestead exemption

protects the home for all time against any and all debts incurred prior to patent. The Federal homestead claimant may start life anew, without his home being at all endangered from past imprudence. The claimant of a state homestead cannot do this as against judgments standing against him on the date of filing his declaration of homestead; antecedent judgment creditors, whose judgments have become liens on his real property, can enforce their judgments against his homestead. His homestead is also subject to the liens of mechanics or laborers. The Federal claimant, therefore, beyond question enjoys a substantial homestead exemption, which under certain circumstances may afford to the claimant and his family more effectual protection for the home against creditors than would a state homestead exemption.

Exemption from the claims of creditors is the principal right conferred by any homestead law, (including the homestead element of the Federal homestead law as dis tinguished from the mere acquirement of title). The prohibition against either spouse encumbering or conveying the homestead without the consent of the other, is a comparatively modern feature of the homestead law; it is not the principal object sought; in many states its wisdom is doubted, and it has not been adopted.

3. THE FACT THAT JOSEPH McCAFFERY WAS CLAIMING AND ENJOYING AN UNPATENTED, UNFORFEITED FEDERAL HOMESTEAD, WHETHER HE HAD COMPLIED WITH THE REQUIREMENTS AS TO RESIDENCE THEREON OR NOT, WAS SUFFICIENT TO BAR THE ACQUISI-

TION OF A STATE HOMESTEAD BY EITHER HIMSELF OR HIS WIFE, BECAUSE A MAN, OR A MAN AND HIS WIFE, CANNOT HOLD TWO HOMESTEADS; AND THEREFORE PLAINTIFF SHOULD NOT HAVE BEEN REQUIRED TO PROVE SUCH RESIDENCE.

But the filing and patent were evidence of the fact (and indeed, we think should be held to be conclusive evidence of it), that he did take up his residence upon his Federal homestead within the time required and continued to reside thereon as long as required, making his home there. Though he was living with his wife on her Anaconda property at the time she filed her declaration thereon, this may have been during a temporary absence from his Federal homestead, allowed under proper circumstances by the Federal homestead law, and the presumption would be that such was the nature of his absence from his Federal homestead. If such was the fact, his wife's legal residence or domicile would be on the Federal homestead with him. and her declaration of homestead on her Anaconda property therefore void.

The claimant of a state homestead in California or Montana, though he has removed from the state, still retains the homestead. (Tipton vs. Martin, quoted p. 35. plfs. orig. Br.); he is still deemed by the law to regard and hold it as his permanent home, and any absence therefrom is deemed merely temporary, and to be so regarded by him; and this amounts to a conclusive presumption. If such person should file a homestead declaration in Mon-

tana, stating that he (or she) "claims them (the premises) as a homestead," such statement could not be made in good faith; because the same person or family cannot have two homes at the same time. While the Federal homestead claimant is required to live with his family on the Federal homestead, the same conclusive presumption should obtain against him, to prevent the acquisition of a state homestead.

4. Defendant's attorney attempts to show that the case of Power vs. Burd, 18 Mont. 22, is not applicable for the reason that it "arose under a different statute from the one we are now considering, a statute which did not require the filing of a declaration of homestead, and made the right to claim a homestead dependent at all times upon use and occupancy." (Dfts. Br. pp. 31-32).

The statute under which that case was decided allowed a homestead only in lands "owned and occupied by a resident of this territory." Under that statute the Supreme Court held that, as the claimant had never lived on the land, his claim, at the time of the levy of execution on the land, that it was his homestead and that he intended to occupy it as such, was immaterial. Yet defendant's attorney maintains that the Supreme Court, in its opinion, approved the admission of the record of the claimant's previous entry of a Federal homestead because it tended to prove the bad faith of this immaterial claim of intention.

The Supreme Court approved the admission of said record "as tending to show whether or not appellant's claim of homestead in the lands in controversy was made

in good faith." The claimant in his answer claimed to have occupied the land. The record of his Federal homestead entry showed his sworn intention to reside on his Federal homestead; and thus impeached the good faith of any subsequent occupancy by him of the ground in controversy under a claim that it was his home,—unless he had meanwhile relinquished or forfeited his Federal homestead, and, if he had, the burden was on him to show it.

In the case at bar, likewise, the record of Joseph McCaffery's Federal homestead entry showed his sworn intention to reside on the Federal homestead. And the issuance of patent shows that he never relinquished or forfeited such homestead. And therefore, the records of such entry and patent impeach the good faith of his wife's declaration of homestead.

5. Defendant's counsel, in his brief, ignores plaintiff's last specification of error under this head, to-wit, that proof of Joseph McCaffery's residence on his Federal claim should not have been required of plaintiff, for the reason that it was a fact peculiarly within the knowledge of the opposite party. And we ask that the court consider the point.

6. In defendants' brief (p. 23), their counsel calls attention to the fact that a state and a government homestead may co-exist in the same ground. But it was held in Hesnard vs. Plunkett, that the former must be contained within the boundaries of the latter, and in so far as it extends beyond such boundaries it is void. (See plfs. orig. Br. pp. 38-41).

7. Defendants' counsel maintains that before patent

the Federal homestead claimant's rights are subject to the control of the Interior Department (p. 26). But if the claimant is qualified to make the entry and complies with the law, and the land entered is open to such entry, the Interior Department canot deprive him of his homestead right.

8. In defendants' brief, on page 28, the case of Hesnard vs. Plunkett is again referred to (See plfs. orig. Br. pp. 38-40), and it is maintained that in that case, the Federal claimant had removed from his state homestead and thereby abandoned it; while Joseph McCaffery had never removed from the Anaconda property claimed as his home, and had never lived on his Federal homestead.

But, in said case, the federal homestead claimant, after taking up his residence on his Federal claim, made claim to a *new* state homestead which was partly within and partly without the boundaries of the Federal claim, but which included the portion of the Federal claim on which he resided, so that he lived on both claims. Yet it was held that the second homestead (the state homestead) was void as to the portion outside the boundaries of the Federal homestead.

The presumption as to Joseph McCaffery's residence is discussed under (3).

9. Counsel for defendants maintain (p. 31) that, if Joseph McCaffery had abandoned his wife, she could declare a homestead although his residence was elsewhere. No abandonment is claimed, however; and the fact, as shown by the evidence (Tr. p. 37, l. 15), that he was living

with his wife in Anaconda when she filed the declaration, shows that there was no abandonment.

10. It is stated by counsel for defendants (p. 27) that the cases cited by plaintiff's counsel have no application. These cases hold, and most of them explicitly, precisely what plaintiff's original brief says they hold. Whether the propositions of law laid down by these cases, as stated in the brief, are applicable to this case, is for the court to say.

THE TWO-HOUSE QUESTION.

1. It was material for plaintiff to show the rental of the tenant premises before and after the filing of the declaration, and the nature and extent of such rental; and she was not limited to showing the fact and extent of the rental at said date. In our original brief are cited the following decisions in which the Court treated such facts as material:

On pages 57 and 58 (In re Crowley).

On pages 58 and 59 (Maloney vs. Hefer).

On pages 60 and 61 (In re Ligget).

On page 82 (Freeman on Executions).

On page 70 (Milburn Wagon Company vs. Kennedy).

On page 93 (Wurzbach vs Menger).

If such facts could not be shown, a debtor, owning a house which he had always rented, having no intention to make it his home but only seeking to acquire a homestead exemption therein, might have his tenant move out, move

into the house himself for a few days during which he would file a declaration of homestead, and then move out again and give place again to his tenant, never himself making any bona fide homestead use of the premises but nevertheless acquiring a homestead exemption therein.

2. We will here reply to defendants' discussion of the evidence:

a. The map of the premises (Tr. 36) indicates that the porch, or a part of it, in front of the north house, extended across the intervening passageway to the wall of the tenement house. W. E. Pinegar, the surveyor, testified (Tr. 34, l. 16) that "on the map the hatched portion was a porch, covered by a roof connecting the two houses * * * there was an entry between the two houses." That entry, at the point where the porch is, is shown on the map and by Pinegar's testimony, to be four feet and three inches wide. J. H. Collins testified (Tr. 31, l. 12) that "the roof of the porch in front of the north house extended across to the wall of the house occupied by the witness (the tenant house)."

The two houses were not, therefore, as alleged on page 33 of defendants' brief, "joined together by a porch which was covered, but passed from one to the other." On the contrary, only the roof of the porch extended across the entry way between the two houses, a space of more than four feet. This fact clearly does not make the two houses one.

b. It is true that there was no division fence between the houses, as that space was used by the McCafferys for

a passageway; and plaintiff did not sell any part of this passage in selling the tenant premises. This appears from the map and the surveyor's description thereon (Tr. 36). The tenant premises, as separately sold, are bounded on the north by the north line of the tenant house back to the corner where the division fence between the rear yards begins. Therefore the statement on page 52 of defendants' brief that plaintiff included in the tenant premises at such sale "about two feet of the passageway between the two houses," is entirely erroneous.

c. The division fence between the rear yards, as shown by the map, (Tr. 36) extended back continuously from the rear corner of the tenant house to the woodshed at the rear of the lot, and the line of the fance was continued through the woodshed building, dividing it into two woodsheds, the southerly portion belonging to the tenant premises. The surveyor traces the continuous course of the fence from the rear corner of the tenant house back to this partition in the woodshed; and he says (Tr. 34, l. 27) that "all the fence referred to was of about the same sort, consisting of a couple of rails with boards nailed on;" and (Tr. 35, l 8), "the fence was entirely up at that time along the length of it at the time the witness made the survey," which was in May, 1901. The testimony of David G. Boyd (Tr. 32, l. 16) shows the fence to have been there in 1898, more than two years before the filing of the declaration. The surveyor testifies (Tr. 34, l. 13) that "there was a partition in the woodshed on the back end of the lot, and the map shows the woodshed and the partition." J. H. Collins testifies (Tr. 31, l. 15) that "there

was access through the witness' portion of the back yard to witness' woodshed, and through the woodshed to the alley in the rear of the lot." David G. Boyd testifies (Tr. 32, l. 15) "there was a woodshed next to the alley used by the witness for firewood." There is no foundation, therefore, for the claim made on page 33 of defendants' brief, that the fence separating the rear yards was a "temporary fence," and separated the back end of the lots "to some extent."

d. Each dwelling house had its own separate appurtenant outbuildings, as shown by the map.

e. There is no evidence to show that the front yard of the tenant house was a "common yard," as claimed by defendants (p. 33), or that defendants ever made any use of it. The tenants, however, were obliged to use the yard in front of the tenant house to gain access to the street, and this use was indispensable to them; therefore the McCafferys cannot claim it unless they show a use of it by themselves of greater importance, but they show no use of it at all. Plaintiff confines her claim, as to front yard, to the ground directly in front of the tenant house. There was no division fence at the front of the houses. But, as stated in Gregg vs. Bostwick, 33 Cal. 220, the boundaries of the homestead are not fixed by fences, but by use. A fence is always considered an important element as showing how far the homestead use extended, but this may be shown in other ways. Defendants say on page 52, that in the sale of the tenant premises the plaintiff included land "which had never been leased by the homestead claimants at any time to tenants." The ground in front

of the tenant house is apparently referred to. But the evidence shows that the defendants rented the tenant premises as a house and lot to the various tenants, and this would include the ground in front of the tenant house, if for no other reason, as being absolutely necessary to the tenants for access to the street. Defendants' statement, that plaintiff "sold more land, and claims more as subject to execution, than under any feature of this case she is entitled to claim," is, therefore, erroneous.

f. On page 51, defendants maintain that the tenant premises were *used primarily as a homestead.* But it was for the jury to say whether such was the fact, under the instructions offered and refused. (Tr. 38-40).

g. Lizzie McCaffery testified (Tr. 37, l. 27) that the rear division fence was originally built to protect the garden on the tenant side of the fence, kept by the tenants and the McCafferys jointly, but she does not say when that was, or how many years before the filing of the declaration. The fence was already there in 1898, and may have been built several years before. This is the only evidence on the subject of a garden; and does not show that the McCafferys had any interest in any garden on the tenant premises within several years at least before the filing of the declaration.

h. As regards the frame addition, David G. Boyd testified (Tr. 32, l. 12) that in 1898 it was used "by his children as a play-room and by his wife as a store-room." J. T. Dulin testifies (Tr. 33, l. 15-18) that, in the summer of 1900, it was entirely vacant. And J. H. Collins testi-

fies (Tr. 31, l. 4) that Mr. McCaffery told him he occupied the frame addition in order to "hold possession."

There is, therefore, no evidence showing any use whatever by the defendants of the tenant premises, at the date of the declaration or during any reasonable time before, except of the frame addition, and there is evidence that such use was fraudulent.

On the other hand the testimony shows that all of the tenants used the brick part of the tenant house, and Boyd also used the frame addition. Collins testifies (Tr. 30, l. 27 et seq.) that "the premises rented by him included the building (without the frame addition), the yard in the rear of said building, and the woodshed." Boyd also testifies to the use of the woodshed. There is no testimony that the defendants in renting the tenant premises ever "reserved" anything except the frame addition.

We submit, therefore, that the homestead status of the tenant premises should have been determined by the jury, upon the question of their principal use.

3. On pages 34, 48, 50 and 52, defendants cite Skinner vs. Hall, 69 Cal. 198, where the Court says "one may file and maintain a homestead upon property which is partially rented out or used for other purposes than his residence." The Court bases this conclusion on Ackley vs. Chamberlain (Cal.), which we have shown (orig. Br. 76) to have been decided under the doctrine of principal use, and which was a case where the claimant had only one house; and on Phelps vs. Rooney, (Wis.), where also the claimant had only one building (orig. Br. p. 78), but which

was not decided under said doctrine of principal use. The last named case was decided by a judge who subsequently decided in Casselman vs. Packard, 16 Wis. 70, that a separate tenant house was not exempt; and subsequently in the same state in Harriman vs. Insurance Co., the Court says that in Phelps vs. Rooney the Court should have held that the building was not exempt unless it was principally used as the residence of the claimant; and in the same state, in Schoffen vs. Landauer a separate tenant house was held not exempt. (Orig. Br. p. 78). In the case cited by defendants the homestead claimant had only one small house, and occupied a small part of it; and circumstances of great hardship are shown. The case is an illustration of the fact that when Courts say that the claimant may have his homestead in property partially rented or used for non-homestead purposes, they almost invariably mean, that where the claimant has but one house, and rents a part of it, or uses part of it for his business, he does not forfeit his homestead right therein, because, if it were taken away from him, he would be deprived of the only home he has. Even under such circumstances, however, it has been held almost uniformly in California that the homestead character of the house is determined by its principal use (See cases cited, plfs. orig. Br. p. 76), where it is also uniformly held that the claimant cannot have two houses, if one is rented (See cases, pp. 54-61, plfs. orig. Br.).

In the case cited the Court refused to interfere with the decision of the lower Court, that part of the lot, which was fenced off and vacant, belonged to the homestead; but

the decision shows that the Court had some doubt on this point. Said part of the lot, however, was not rented to tenants, and presumably the evidence showed that it was devoted to some slight homestead use.

This case is also cited by defendants (p. 52) as showing that the "mere leasing of a portion or a majority of the rooms of the house, does not destroy the homestead character of the premises." The decision so holds, as does Heathman vs. Holmes (p. 77, plfs. orig. Br.); the other California decisions, rendered both before and after these, hold that the principal use determines the homestead character.

But the broad rule contended for, even if established as to cases where the claimant has only one house, does not apply where he has two, as in that case the homestead character of the tenant house is determined by its principal use (cases cited on pp. 86-93, plfs. orig. Br.).

4. On pages 35 and 50 of his brief, defendants' counsel denies that Section 1693 was derived from the California law, and asserts that the California decisions, therefore, are not authority in Montana.

While we regard the Montana cases cited on pages 52-53, of our former brief, as conclusive on this point, we would call attention also to the case of Lindley vs. Davis, 6 Mont. 456, where the Court says:

"Sections 311 and 313 of our Code are taken from the Act of 1851 of the Laws of California, as will be seen by reference to Gregg vs. Bostwick, 33 Cal. 220, 224, 225."

Said Section 311, so Judge Brantly states in Yerrick

vs. Higgins, was brought forward into the present codes as Section 1693, and Section 1693 "is substantially the same as Section 322 of that Code."

5. On pages 36-38 of his brief defendants' counsel quotes from Yerrick vs. Higgins, as holding that Section 1693 "specifies particularly the subject matter to which the selection and claim may apply." It is also said, elsewhere in the same decision, that said section "fixes the limitations." Said section specifies the subject matter as being "land * * * used for agricultural purposes, and the dwelling house thereon and its appurtenances * * * (or) land * * * within a town plot, city or village, and the dwelling house thereon and its appurtenances." It also "fixes the limitations" of area and value.

Specifying the subject matter does not involve the specifying of the quantity of the subject matter, or the value of the subject matter, which are matters of limitation, but merely the *subject matter*, to-wit, land and dwelling house and appurtenances. This phrase, therefore, does not warrant the conclusion that defendants counsel appears to derive therefrom, that a homestead claimant in a city or town is entitled to one-quarter of an acre without any restriction as to its use, provided the limitations of value and area are observed and the claimant resides thereon.

The next sentence in said decision, that: "Standing alone the general definition would leave no limit to the amount or value of the property selected and claimed pro-

vided claimant resided in his dwelling upon it," has been fully discussed by us (pp. 61, 62, plfs. orig. Br.) We will merely add that this dictum, if it means what it seems to on its face, was announced without any citation of authorities, without any reason being given for the apparent departure from the California authorities, which were binding on the Court (orig. Br. p. 61, cases cited) unless the strongest reason to the contrary appeared, and appears to have been the result of an attempt, in passing, to summarize a large subject without any necessity for so doing in the case then before the Court. We think the true explanation of the dictum is, that the Court, in announcing it, intended the implied condition that the property must be of homestead character, conforming to the definition of homestead found in Section 1670; otherwise, we must conclude that the Court looked upon Section 1693 as a definition of homestead, after stating that the definition was found in Section 1670 and the limitations in Section 1693.

Defendants' counsel also quotes the following from the same case:

"The Code contains no provision by which, after the homestead has once been selected, there can be a readjustment of the area and the surplus taken by the creditor."

Counsel for defendants infers from the statement quoted, that the levy of execution on a part of the premises claimed as the McCaffery homestead, and the sale thereunder, were not provided for in the homestead law of Montana, or contemplated thereby, and were therefore inoper-

ative and void. Following his view to its logical conclusion, it must follow, in the case at bar as in the case he cites, that as the McCaffery homestead claim is void in part, as was the homestead claim in the case cited, it must accordingly be held all void likewise; because the invalid part cannot be separated from the valid part. But although the homestead statutes in California are the same as those of Montana, aside from Mont. C. C. Section 1693, the Court there, in a case like the one at bar, find a way to segregate the valid part from the invalid part of the homestead, by simply allowing the invalid part to be sold under execution. It is true that in California, there is no limitation of area; but the limitation of area has no bearing upon a case like the one at bar where the entire area claimed does not come up to the limit, and where the segregation is sought on the ground that there is a specific and described portion of the ground claimed as homestead which has never had the homestead character impressed upon it, on account of never having been devoted to homestead uses. That the existence of an area limitation has no bearing upon the case at bar is shown by the fact that in the states which have such a limitation, the creditor is allowed to levy upon and sell under execution such portion of the premises claimed as homestead as are not properly part of the homestead by reason of being rented to tenants There is such a limitation in Michigan, Wisconsin, and under the old Iowa law, and under the decisions from these states (cited on page 64, plfs. orig. Br.) the creditor was allowed to sell under execution tenant premises claimed as part of the homestead. And nearly all of the

California cases cited on pp. 54-60, and the cases from other states cited on pp. 66-72, of plaintiff's first brief, were cases where tenant premises, claimed as part of a homestead, were allowed to be sold under execution.

In the case from which the quotation by defendants is taken, the ground claimed as a homestead was all equally impressed with the homestead character, one part as much as another; the claimant used it all for homestead purposes. As it stood, the homestead was not valid because it exceeded the legal limitation of area; it was therefore totally void unless a way could be found to reduce it to the legal size. The law furnished no method of doing this, although there is a statutory method of reducing the value where the value exceeds the statutory limit. The Court could not mark off a specific portion of the ground and say "this part is homestead, but the remainder is not homestead," because one part had the homestead character as fully as any other part. There was, therefore, no way of curing the defect, so that the Court was compelled to hold the illegality of the homestead incurable.

Again, counsel for defendants quotes from the same case, as follows:

"If the selection is in compliance with the law, within the value limit, and remains there, the claimant is beyond the pursuit of his creditors, and so far as they are concerned he may forever after retain the specific property selected * * *."

Counsel for defendants infers from this statement. also, that so long as the premises claimed are within the

limitation of area (and value), if the claimant resides thereon, it is a legal homestead, without regard to the other uses to which it is devoted, and may therefore include tenant houses. But the Court says that the selection must be "in compliance with the law," that is to say, the homestead must fulfill the requirements of the statutory definition of homestead stated in Section 1670 Montana C. C. But the California cases cited on pages 54-60 of plaintiff's first brief are practically all constructions of such definition, and based thereon; and they hold that a homestead declaration does not make tenant premises homestead or part of a homestead.

6. On pages 39-41 of defendants' brief, are quoted the Nevada cases, and the Idaho case on page 47, which are discussed on pages 65-66 of plaintiff's first brief. We would especially refer to the elaborate criticism of these Nevada cases in Waples on Homesteads, pp. 235 et seq.. which is too long to reproduce here. None of these cases deal with premises leased to tenants.

7. On pages 41-44, defendants' counsel discusses certain Illinois cases. We referred to these cases on page 73 of our first brief, as being decided under a statute which expressly makes the exemption the primary thing, and the homestead and residence features merely incidental. The statute, which is quoted on page 42 of defendants' brief shows this to be true. It does not say that the *homestead* shall be exempt, as is expressly provided in most other states, but exempts "the lot of ground and the buildings thereon occupied as a residence and owned by the debtor. * * * to the value of one thousand dollars." There

is no definition of homestead, but the term "homestead" is applied in a descriptive way, somewhat loosely, to the exemption. What is expressly exempted is "the lot," etc.

In a later Illinois case (Sever vs. Lyon, 48 N. E. 926), the Court says:

"The homestead exempted by the statute is an estate, to the extent in value of $1,000, in the farm or lot of land, and buildings thereon, occupied as a residence, together with any other buildings upon such lot, whether for carrying on business, or deriving income in the way of rent. In such case the exemption is not limited to the portion of the lot covered by the dwelling, but, *by the terms of the statute, extends to the whole lot.*" In that case the claimant had her residence on a fraction of one lot; and also owned the adjoining lot on which were houses leased to tenants, and she claimed the latter as part of her homestead. The Court, after stating that the "lot" exempted by the statute was not necessarily confined to a legal subdivision, said, referring to said adjoining lot:

"Lot 4 is a distinct and separate lot, occupied under leases by other heads of families residing thereon. It is impossible that appellee should be in the occupancy of that lot, with her family, as a residence, while she occupies a separate lot as a homestead, and it is so occupied by her tenants as their residences. It is in the same enclosure with her residence, but that fact alone is not sufficient to annex a separate lot, not occupied by her, to her homestead."

Here, even in Illinois, a part of the premises claimed

as homestead, and which would have been part of the homestead if used as such, was held to be no part of the homestead because rented to tenants.

8. On page 44, defendants' counsel cites two Texas cases.

In the early case of Hancock vs. Morgan, cited, the claimant erected a new house on his homestead lot and moved into it, and leased his old house which the Court held to be, nevertheless, exempt for the reason that the renting was only temporary. But the McCafferys had never made their home in the tenant house, but rented it ever since it was built. The decision was rendered under a Constitutional provision subsequently construed in Iken vs. Olenick (orig. Br. 67, 68). That case defines the term "homestead" as it is defined in Gregg vs. Bostwick, and says the purpose of the homestead law is not to exempt a definite quantity of land, but only the homestead in the popular sense and not to allow the debtor to include therein property merely contributing to the support of his family, thus virtually over-ruling the case cited.

The other Texas case cited (Bailey vs. Baukright), was decided under the later Constitution of 1876 (orig. Br. p. 68), expressly allowing temporary renting, under which the fact of the claimant continuing to make some use of the tenant premises is held to show that he intends the renting to be merely temporary (See orig. Br. 93), and the burden is placed on the creditor to rebut this presumption and show the renting to be in fact permanent. The Court held the tenant house exempt in that case because,

"The renting of part of lot 6 is not shown to be permanent."

9. On page 44 of defendants' brief is cited the case of Winland vs. Holcomb (Minn.), 3 N. W. 341. This case is referred to on page 80 of plaintiff's first brief, as showing the extreme liberality manifested by some Courts in protecting from execution the house in which the homestead claimant lives when he has no other house; and said case is there contrasted with another decision of the same state (Tillotson vs. Millard, 7 Minn. 513), where the Court held that the object of the statute was to provide a home, and not to give the use of a certain quantity of land and dwelling house for any other purpose.

10. On page 45 defendants cite Layson vs. Grange (Kans.), 29 Pac. 585. In that case a carpenter altered his shop into a 4-roomed house; he rented the four rooms, reserving the basement thereunder for his shop; he also reserved all the ground, giving the tenant merely the right of ingress and egress. The tenant got water from the owner's residence, and kept his coal there. It was held to be not a "total abandonment" of any part.

In the case at bar, however, the tenants used the house and ground and outbuildings, the use by the owner being limited to the one-roomed frame leanto at the rear of the brick house. The case cited may well be compared with Dyson vs. Sheley, 11 Mich. 527 (plfs. orig. Br. pp. 87, 88), where the Court said: "The rights of the owner in the tenant side, whatever they are, do not predominate over those of the tenant, and do not show that the tenant had

a mere easement," and then decided the homestead status of the tenant property according to the principal use made of it. In the case cited by defendants, the Court may have regarded the use of the basement for business to be as important as the use of the rest of the building for residence.

In another Kansas case, Ashton vs. Ingle, 20 Kans. 679 (plfs. orig. Br. 89), it was held that a subsidiary use of the tenant premises for homestead purposes by the owner did not make them part of the homestead, but that the tenant premises were nevertheless subject to execution. And tenant premises were held not part of the homestead in Poncelor vs. Campbell (Kans.), 63 Pac. 606.

11. On page 46 of their brief defendants cite Phelps vs. Rooney, 9 Wis. 70. This case, together with other Wisconsin cases, has been discussed in discussing Skinner vs. Hall, supra; and these Wisconsin cases afford a striking illustration of the strictness of the courts in denying the claimant homestead rights in a separate tenant house, as contrasted with the liberal treatment accorded him when he has only one house.

12. On page 47, defendants cite Kiesel vs. Clemens (Idaho), 56 Pac. 84. This was also the case of a single building, used as a hotel; it was held exempt, the Court not following the doctrine of principal use.

13. On page 49, defendants cite Heathman vs Holmes, which was also the case of a single building. We have already discussed it on page 77 of our former brief.

14. On page 51, defendants' counsel argues that, as

the Montana homestead law contains a limitation of area, decisions from states which have no such limitation are not applicable; and he says that most of the states have no such limitation, but only a limitation of value.

But, as we have pointed out already (plfs. orig. Br. pp. 63, 64), statutes of the same general form and phraseology as Section 1693 (which contains the limitations) are found in Michigan, Wisconsin, and in the old Iowa law, all of them containing the limitation of area; and under all of them tenant houses are held not part of the homestead. Also, as shown in the Appendix of Waples on Homesteads, the homestead laws of Alabama, Mississippi, Florida, and the later Iowa homestead law, all have the limitation of area; and in all of these states tenant houses claimed as part of the homestead are held subject to execution, as appears in the cases from these states cited in plaintiff's first brief (pp. 71, 72, 64 and 65).

It may be added that, of the states named, the following have the double limitation of area and value obtaining in Montana: Michigan, Iowa, Alabama and Mississippi.

Defendants' counsel goes on to say: "Wherever the decisions have been under statutes analogous to Section 1693, supra, they are invariably in accordance with our contention, as to the proper construction * * *."

Just what decisions are referred to we do not know. Counsel for defendants has not cited a single case, under any statute analogous to those of Montana, holding a separate tenant house exempt under any circumstances, except Bailey vs. Baukright (Tex.), cited by him on page 44.

which was decided under the phrase allowing temporary renting not found in Montana. His statement is plainly the reverse of correct as applied to Gregg vs. Bostwick; and as applied to the decisions in Michigan, Wisconsin and Iowa (Cited, plfs. orig. Br. 64, 65, 77, 78, 79, 87 and 88); to which may be added Texas, where the Constitutional provision quoted on page 67 of plaintiff's original brief, bears a strong resemblance, in its phraseology, to the statute under which Gregg vs. Bostwick was decided (as does the later constitutional provision cited by me on page 68), and receives a similar construction in Iken vs. Olenick. For these Texas cases, see pp. 68-71 and 89-93 of the original brief.

A motion has been served and filed, asking the Court to receive and consider certain journal entries of the lower Court, as part of the record in the present proceeding, as showing (1) that the lower Court withdrew from the jury all consideration of the question of the homestead character of the tenant premises, which we desire to urge as an additional error; and as showing (2) the position taken by the Court at the close of the evidence on the question of law set forth in the refused instructions.

We ask consideration of this motion in connection with the rest of the case.

Plaintiff, in conclusion, respectfully renews her request, made at the close of her original brief, that the judg-

ment be reversed, and the cause remanded to the lower Court with directions to enter judgment in her favor.

Respectfully submitted,

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